Office-Supreme Court, U.S.
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83-265

No.:_____

IN THE

Supreme Court of the United States

October Term, 1983

DENISE A. CHAFFEE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Dated: 15 August 1983

QUESTIONS PRESENTED

1. Whether, due to the judicial erosion of the initial bases supporting the Feres doctrine, the application of Feres to incidents of military medical neglect is no longer warranted and thus, the Court below erred in applying the preclusive strictures of Feres to petitioner's malpractice claim?

2. Whether the doctor-patient relationship is materially different than that of an officer commanding orders to subordinates?

3. Whether permitting medical malpractice suits by servicepersons in non-combatant settings in military hospitals in the United States would be disruptive of military discipline.

4. Whether, since the two "special factors" dispositive in the recent Supreme Court decision in Chappell v. Wallace __U.S., 76 L Ed 586 (1983) are lacking in the instant case and other medical tort actions, malpractice suits should be permitted in instances of military medical neglect?

5. Whether petitioner's status as a recruit in basic training at the time of her injury should be viewed as an additional exception to the Feres doctrine?

6. Whether permitting suits in instances of military medical neglect would derivitively lead to a greater accountability and identification of incompetent health-care providers, and thereby result in a reduction in the current epidemic levels of military medical neglect and concomitantly reduce the cost to the government of maintaining the medically neglected servicepersons on disability?

7. Whether the"incident to service " standard of Feres is vague, cumbersome, and impossible to apply uniformly, resulting in inconsistent and inequitable results, especially in military malpractice cases?

8. Whether the "in the line of duty" standard should replace the "incident to service" standard of Feres thereby rendering such non-duty injuries sustained in instances of medical neglect actionable?

9. Are not the long-standing pleas for change in the application of Feres from the courts below, and the numerous criticisms from legal scholars, along with the recent formation of a national citizens group , CAMI (Citizens against Military Justice), specifically formed in reaction to the mounting inequities fostered by the Feres, rule, sufficient notice to this Court, the author of Feres, that major changes are in order and should issue from this Court?

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NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DENISE A. CHAFFEE,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Petitioner Denise A. Chaffee prays that a a Writ of Certorari be issued to review the judgememt and memorandum opinion of the United States Court of Appeals for the First Circuit entered on 19 May 1983 affirming the judgement of the United States District Court for the District of Massachusetts and entered on 27 September 1982, dismissing petitioner's complaint.

OPINION BELOW

The memorandum opinion and order of the Court of Appeals for the First Circuit, not yet reported, appears in Appendix A hereto.

JURISDICTION

The judgement of the Court of Appeals, printed in the Appendix A hereto, which is sought to be reviewed was entered on 19 May 1983. This petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. s. 1254 (1).

STATEMENT OF THE CASE

While in her fourth week of basic training, petitioner, Ms. Denise A. Chaffee, an eighteen year old female, was admitted to Noble Military Hospital, Ft. McClellan, Alabama, on 25 July 1979 for the purpose of undergoing medical tests and treatment for abdominal pains and amenorrhea. On 8 August 1979, she underwent a routine operative procedure known as dilation and curettage (D&C) with exploratory laparoscopy to ascertain the nature of her pains and associated difficulties.

Due to the negligence of the attending medical staff, Ms. Chaffee's oxygen supply was impaired in the course of the operative procedure. The lack of oxygen caused her to

to suffer diffuse post anoxic encephalopathy, a severe and irreversible brain pathology, resulting in a number of physical dysfunctions and enormous emotional anguish. She remained in a comatose state, completely paralyzed, blind, unable to care for herself, and could not speak audibly for months.

Ms. Chaffee has spent a good part of the last three and a half years in various veterans hospitals undergoing therapy and treatment for a host of recurring ailments. She eventually graduated from a walker, to crutches, to a cane. As a consequence of her permanent brain damage she is legally blind and nystagmic, her speech is dysarthric, she has an unsteady gait and in unable to do fine movements with her hands. Moreover, she continues to have episodes of severe headaches frequently followed by uncontrollable epileptic seizures.

She cannot write legibly, has trouble pouring things because of periodic spasms in her hands, and she occasionnally falls down stairs when her legs suddenly and unpredictably

buckle from under her.

On 24 July 1981, an administrative claim on behalf of petitioner for damages was timely filed with the Department of the Army, the Pentagon, Washington, D.C. pursuant to 28 U.S.C. s. 2675. The Department of the Army rejected the claim on 13 August 1981 without further investigation into the matter.

On 3 February 1982 petitioner's complaint was filed with the United States District Court, District of Massachusetts, Denise A. Chaffee v. United States of America, CA No. 82287 -G. The action was brought under the Federal Torts Claims Act, 28 U.S.C. Sec. 1346(b), 2671 et. seq. after the claim was initially denied by the Department of the Army.

On 27 September 1982 judgement and order to dismiss petitioner's complaint for failure to state a claim upon which relief can be granted was entered.

On 25 February 1983, pursuant to 28 U.S.C. Sec. 1291, petitioner appealed the District Court's judgement to the United States Court of Appeals for the First Circuit.

On 19 May 1983, the First Circuit affirmed the District Court's judgement, noting that " judicial modification of Feres can only be accomplished by the Supreme Court itself". Appendix A, infra .

REASONS FOR GRANTING THE WRIT

I

INTRODUCTION: POLICY CONSIDERATIONS INITIALLY UNDERLYING THE JUDICIALLY CREATED FERES DOCTRINE

The Federal Torts Claims Act of 1946, hereinafter referred to as the FTCA, stripped away the sovereign immunity of the United States Government, rendering it liable like any"private person" to a right of action for tortious acts committed by the government in accordance with the " law of the place where the act or omission occurred." 28 U.S.C. Sec. 1346 (b).

Congress created several exceptions to this right of action.1/ 28 U.S.C. 2680. However, none of the exceptions specifically excludes all actions, including medical malpractice, by members of the military. In fact, the FTCA specifically includes " members of the military or naval forces of the United States" in its definition of " employee of the government". 28 U.S.C. Sec. 2671.

1/ The provisions relevant to military personnel and medical malpractice prohibit any claim: (1) based on the exercise or performance or failure to exercise or perform a discretionary function.. (2) "arising out of combatant activities...during time of war;", and (3) "arising in a foreign country." 28 U.S.C. Sec. 2680 (a, j,k).

However, in a series of decisions, this Court created the Feres doctrine and implied yet another exception to the FTCA. The broad boundaries of this rule are marked by three Supreme Court cases: Brooks v. United States, 337 U.S. 49 (1949), Feres v. United States, 340 U.S. 135 (1950), and United States v. Brown 348 U.S. 110 (1954).

While admitting that the FTCA by its plain terms did not preclude all suits by military personnel, and with little legislative history to guide it, the Court nonetheless concluded that no action lies for injuries to military personnel whose injuries arise " out of or in the course of activity incident to military service". Feres, supra, at 146.

The policy considerations which were initially used to support the Feres rule can be summarized as follows: first, the lack of the so-called " parallel private liability". The Court stated that no private liability analogous to that which is asserted by a service person attempting to recover for negligence of the government exists at common law. Thus no new claim was purportedly created by the FTCA; rather the Act " was not to visit the government with novel and unprecedented liabilities." Id. at 142.

Second, the Court emphasized the irrationality of subjecting the " distinctly federal" relationship between the government and its soldiers to the varying tort laws of each state as required by the claim. Id. at 143; 28 U.S.C. Sec. 1346(b).

Third, the Feres Court noted the existence of a comprehensive legislative scheme of benefits for service related injuries, the Veterans Benefits Act, 38 U.S.C. Sec. 101 et. seq. as a factor persuasive of eliminating the FTCA as a remedy for injured military personnel, Id. at 145.

Fourth, In United States v. Brown, 348 U.S. 110 (1954). the Court noted another factor for denying recovery under the FTCA. Namely, the Court was concerned with the possible adverse effects of such suits upon military discipline.

Thirty-three years have elapsed since the formulation of this controversial doctrine. Many changes, discussed below, have occurred in the ensuing years and, taken collectively, should signal this Court that the time is propitious for a long-overdue reconsideration of the continued applicability of the Feres rule as it currently relates to instances of alleged military medical neglect.

II

EROSION OF THE BASES THAT INITIALLY SUPPORTED THE FERES RULE.

Since the original Feres decision, this Court has delivered a series of opinions, and the lower courts have variously interpreted those opinions, which have either undermined or completely discredited some of the aforementioned factors that initially supported the Feres rationale.

The first factor of Feres - the lack of an analogous private right of action - was completely undermined by the Court itself in a series of three decisions. United States v. Muniz, 374 U.S. 150 (1963), Rayonier, Inc. v. United States, 352 U.S. 315 (1957), and Indian Towing Co. v. United States, 350 U.S. 61 (1955). These cases specifically refuted the private liability defense as a misrepresentation of the purpose of the FTCA and stated that the act now extends " to novel and unprecedented forms of liability". Muniz, supra, at 159.

Later cases have tended not to support the second factor of the Feres rationale - the uniquely federal character of the soldier-government relation and the concomitant potential unfairness of exposing military personnel to varying local standards of care. For example, in Muniz, supra, the Court observed that denial of any tort recovery is far more prejudicial to a plaintiff than mere application of non-uniform state laws. Id. at 162.

Furthermore, the Court in Brooks, supra, had no difficulty in allowing recovery to the serviceman on leave despite the distinctly federal relationship that existed at the time of the injury.

The Veterans' Benefits Act, the third factor in the Feres rationale, is one of the considerations discussed most inconsistently by the Court. In Brooks, supra, this Court took note that neither the FTCA nor the Veterans' Benefits Act contained a clause making it the exclusive remedy or requiring election of a remedy, and concluded that service members on furlough could utilize the FTCA, but veterans benefits would be set off against recoveries. Id. at 52-54.

In Brown, supra, which permitted veterans to recover for injuries under the FTCA, the majority of the Court refused to hold that the existence of a comprehensive compensation system barred suit under the FTCA. Id. at 113. In dicta, in Muniz, supra, the Court observed that the existence of a compensation statute " does not of necessity" preclude a suit for negligence under the FTCA. Id. at 160. On the other hand, in Stencel Aero Engineering Co. v. United States, 431 U.S. 666 (1977), though not overruling Brooks or Brown, the Court reasoned that veterans benefits "provide an upper limit of liability for the

for the Government as to service-connected injuries." Id. at 673.

In Parker v. United States, 611 F. 2nd. 1107 (5th Cir. 1980), the court interpreted and weighed the various meanings of the prior Supreme Court holdings relative to the effect of veterans' benefits on FTCA actions, and concluded that receipt of such benefits does not automatically foreclose an FTCA course of action. Id. at 1015.

Petitioner would like to expand on the often offered argument that the existence of uniform and comprehensive scheme of veterans compensation is analogous to state workmen's comp. statutes and thus should operate as the only available compensation vehicle in cases of military medical malpractice.

Let us imagine that a civilian employee, covered by workmen's compensation, injures his neck in a fall from a ladder in the course of his work. He would receive a certain compensation depending on the extent of his injuries but would be precluded from suit against the employer or his fellow workers. If, however, after the initial injury he is taken to a hospital for treatment and suffers further debilitating harm due to negligent medical treatment, he could institute a suit based on the negligent care received in the hospital.

If the same set of factors were to apply to

a service person, that individual would not only be barred from suit for injuries sustained in the course of his duty assignment, but would also be precluded from instituting an action for the negligent care rendered in the military hospital. Thus there is no analogy to workmen's compensation in instances of medical neglect. The civilian can seek legal redress while the service person cannot.

The last and most enduring factor advanced to justify the continued use of the Feres rule is the potential disruption that civil suits could have on military discipline and morale. Stencel, supra; Hunt v. United States 636 F. 2d 580 (D.C. Cir. 1980); Chappell v. Wallace, __U.S.__, L.Ed. 2d 586 (1983).

There undoubtedly is a need to maintain military discipline, especially where a command may be challenged, and where there is need for unfettered exercise of discretion in carrying out military policies. The Feres rule, however, need not be the sole vehicle effectuating that end. The FTCA permits the courts to evaluate and defer to military autonomy where necessary. Section 2680(a) of the FTCA specifically allows the courts to determine whether the negligent act was a discretionary action. If so, it would fall within the stipulated discretionary function exception of the FTCA and would not allow military personnel to question central

decisions that establish general standards, regulations and directives by the military within their decisional powers.

From the foregoing review, therefore, it can be seen that three of the principal factors that initially served as the theoretical struts supporting the Feres rationale have either collapsed, eroded or been treated in an inconsistent manner. The remaining theoretical pillar supporting the beleagured Feres rule - the fear that law suits would wreak havoc with discipline and morale could easily be accommodated by the discretionary function exception of the FTCA. 28 U.S.C. 2680 (a), and certainly should have no application in cases of military medical neglect.

III

MEDICAL NEGLIGENCE CASES DISTINGUISHABLE: MILITARY PERSONNEL SHOULD BE ABLE TO SEEK REDRESS IN FEDERAL COURTS.

A detailed and insightful analysis of the factors underlying Feres in Hunt v. United States, 636 F.2d 580 (D.C. Cir. 1980) led that court to conclude:

" The protection of military discipline ...serves largely if not exclusively as the predicate for the Feres doctrine. Although the Supreme Court has woven a tangled web in its discussion of the 'distinctly federal' notion and of the alternate compensation system, it has not wavered on the importance of maintaining discipline within the armed forces .... only this factor can truly explain the Feres doctrine and the crucial

line it draws..." Id. at 599. (See also Miller v. United States, 643 F.2d 481,496 (1980)).

Just two months ago, this Court reaffirmed the disciplinary factor as the principal reason for precluding law suits by individuals in the military for alleged contitutional violations. Chappel v. Wallace, __U.S.__, 76 L Ed 2d 586 (1983).

With the above proposition as a given, and in the light of the aforementioned erosion of the other bases which initially supported the Feres rule thirty-three years ago, it is irrational and inequitable to continue to apply the modern and streamlined rationale currently underlying Feres to instances of military medical neglect , especially in non-combatant settings in Department of Defense Hospitals in the United States.

The inclusion of medical neglect cases within the preclusive stricture of the Feres rule was inappropriate from the outset, and has unwittingly contributed to the continued rash of malpractice incidents in the military.

It is farfetched to imagine that permitting victims of medical neglect to institute law suits would even remotely affect or disrupt discipline or morale in the armed forces. On the contrary, military discipline and morale can only be adversely affected with the knowledge that episodes of medical neglect continue unabated and unredressed.

Illustrative of the low level of morale and confidence engendered by the current situation is a poll taken by the Atlanta Constitution: of 202 military physicians who answered a questionaire, only four said they would prefer that their families be treated under the military health-care system.2/

Such a continued atmosphere of acquiescence by this Court can only perpetuate the sub-standard performance of certain medical personnel. Hall v. United States, 528 F. Supp. 963 (D. New Jersey, 1982) is illustrative of the problem. In that case Ms. Glenna Hall, also a recruit like Ms. Chaffee, died of pneumonia due to alleged medical neglect, three days after being admitted into a military hospital. What is especially distressing about that tragedy is that it occurred one year to the day and at the same medical facility - Noble Military Hospital- where Ms. Chaffee suffered her debilitating episode. How many others have suffered similar fates there?

The Balboa Navy Hospital in San Diego is another shocking example of the sad state of affairs. Seventy-five percent of the civil cases handled in 1976 by the U.S. Attorney for the Southern District of California involved

2/ The Feres Doctrine as It Relates to Private claims. Hearing before the Subcommittee of Agency Administration of the U.S. Senate Judiciary Committee(Ser. no.J-97-110) p. 30

medical negligence at Balboa Hospital. (Brief of petitioner in Meagher v. U.S. 551 F.2d 313; Cert. denied, 434, U.S. 821 (1977))

What positive policy consideration is there in permitting military medical negligence to continue unredressed?

There is an enormous difference between the relationship of a serviceman and his superior officers and a servicepatient to his military doctor. That association of military doctors to their patients is strictly non-milatary and medical in nature. Command functions exist only between the doctors and their junior staff.

It is rather difficult to imagine a surgeon operating on an unconscious patient like Ms. Chaffee, to be exercising any official military or command function. The relationship between Ms. Chaffee and her doctor who rendered her helpless was that of patient-physician and not soldier-officer.

Perhaps no other aspect of the military relation most closely approximates civilian life and carries with it the least of the trappings or characteristics of military life than the setting in a Department of Defense hospital situated on a military base in the United States. Such hospitals are removed from the mainstream of military life or activity.

The "peculiar and special relationship" of soldier to his superiors articulated in Brown v. United States, supra simply does not exist in the latter setting between medical doctors and patient; and thus, that basis of support for the Feres rule is inapplicable in military malpractice cases. For some inexplicable reason that fact continues to be ignored by this and other courts.

As a matter of public policy, therefore, suits should be permitted against the government in instances of military medical negligence occurring in non-combatant settings in military hospitals in the United States.3/

As stated above, medical malpractice is not an act of military command function or administration. Rather, the cause of action is based on professional standards independent of either the military or the government. That is, the standards of medical care are not determined by army regulation but by pre-existing requirements of the medical profession. Society as a whole has an interest in deterring military officials from repeated and undue acts of negligence which have no bearing on military discipline.

3/ All tort claims, including medical negligence, are automatically barred by the FTCA exception in 28 U.C.C. Sec. 2680(k) if such claims "arise in a foreign country".

IV
INSTANCES OF MEDICAL NEGLECT BORDER ON EPIDEMIC

It has become obvious that inferior and sub-standard military health-care goes hand in hand with the current status of immunity from tort liability. Despite the alarming number of medical negligence injuries reported, little has been done by Congress or the military to improve medical care.

Instances of military medical neglect appear to be epidemic from the substantial number of reported cases in recent years.4/

4/See, Alexander v. United States, 500 F.2d 1 (8th Cir. 1974); Bailey v. Bushkirk, 345 F. 2d 298 (9th Cir. 1965);Bailey v. DeQuevedo, 375 F.2d 298 (3rd Cir. 1968); Collins v. United States, 642 F.2d 217 (7th Cir. 1981); Bankston v. United States, 480 F.2d 495(5th Cir. 1973); Coyne v. United States, 411 F. 2d 987 (5th Cir. 1969); Crumpler v. United States, 495 F. Supp. 266 (D.C.S.D. N.Y.1980); DeFont v. United States, 455 F. 2d (1st Cir. 1972); Dilworth v. United States, 387 F. 2nd 591 (3rd Cir. 1967); Fisk v. United States, 657 F. 2d 167 (7th Cir. 1981); Hall v. United States, 451 F.2d 353 (1st Cir. 1971); Hall v. United States, 528 F. Supp. 963 (D.C.N.D. New Jersey 1982); Hall v. United States, 314 F. Supp. 1135 (D.C.N.D.Cal. 1970); Harten v. Cooms, 502 F.2d 1363 (10th Cir. 1974); Hawe v. United States, 670 F. 2d 653 (6th Cir. 1982); Henderson v. United States, 511 F.2d 399 (D.C. Cir. 1974); Howell v. United States, 489 F. Supp. 147 (D.C.W.D. Tenn. 1980); Henning v. United States, 446 F.2d 774 (3rd Cir. 1971); Henninger v. United States, 473 F.2d 814 (9th Cir. 1973); Hunt v. United States, 636 F.2d 580 (D.C. Cir. 1980); Johnson v. United States, 631 F.2d 34 (5th Cir.1980); Kennedy v. United States, 393 F. Supp (D.C.

In addition to the reported cases, health-care complaints for the Army and Air Force totaled 488 in 1979 and 567 in 1980. The Army also reported that 48 law suits were pending in 1981 as a result of disputed claims.5/ Such claims against the government are an indicator of medical care in the military and suggest serious problems exist.6/

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4 Ctd./ Mass. 1975); Koch v. United States, 316 F. 2d 532 (9th Cir. 1963); Labash v. United States, 668 F.2d 1153 (10th Cir. 1982); Lowe v United States, 440 F.2d 453 (5th Cir. 1971); Peluso v. United States, 472 F.2d 605 (3rd Cir. 1973); Redmond v. United States, 331 F. Supp. 1222 (N.D. Illinois 1971); Roach v. Shields, 371 F. Supp. 1393 (D.C. E.D. Penn. 1974); Robak v. United States, 658 F. 2d 471 (7th Cir. 1981); Scales v. United States, 685 F. 2d 970 (5th Cir. 1982); Schwager v. United States, 326 F. Supp. 1081 (D.C.E.D. Penn.1971); Shultz v. United States, 421 F.2d 170 (5th Cir 1969); Southard v. United States, 397 F. Supp. 409 (D.C. E.D. Penn. 1975); Tirril v. McNamara 451 F.2d 579 (9th Cir. 1971); Vallance v. United States, 574 F.2d 1283 (5th Cir. 1978); Veillette v. United States, 615 F.2d.505 (9th Cir. 1980); Wisniewski v. United States,416 F. Supp. 590(D.C. E.D. Wisconsin, 1976) Shaw v. U.S. (Cite unavailable; reported in Army Times 28 March, 1983 p.4);Stege v. U.S.(cite unavailable, reported in Navy Times, 7March, 1983 p.1)

5/ See note # 2,supra at p. 38

6/ Keil, Medical Malpractice Claims against the Army. 75 Mil. L. Rev. 1 (1977).

Recent articles have exposed the many shortcomings of the military health-care facilities and staff. For example, the Atlanta Constitution ran an excellent series on the numerous problems experienced at the Wilford Hall Hospital at Lackland AFB in Texas.in December 1981.7/

In a recent six-part investigative report, the Army Times revealed an array of shortcomings in Army health-care systems. 8/ More recently the same paper exposed enormous deficiencies at the Bassett Army Hospital at Ft. Wainwright, Alaska which resulted in the replacement of the Commander of the Hospital.9/

Secretary of Defense, Casper Weinberger has recently called for a crackdown on deficiencies in military health-care facilities as a result of the aforementioned exposés.

Unfortunately, such remedial efforts, although heartening, are customarily sporadic and short-lived. There is, however, another and more effective method of bringning about improved performances at military health

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7/ See note #2 ,supra at pp. 29-47.

8/ Army Times November 8, 15,22,29, and December 6, and 13 issues).

9/ Army Times , May 2, and 9 Issues.

facilities, and that is for this Court to remove instances of military medical malpractice from the proscription of the Feres Doctrine.

Such an action not only would remedy a long-standing flaw in the law but would also have the heuristic value of continuously exposing those individuals or institutions responsible for repeated administration of sub-standard care to our service personnel.

As the law currently stands there is no impetus on the part of the Department of Defense to even monitor cases of alleged medical abuses. For example, when petitioner's administrative claim was rejected by the Department of the Army, based on the Feres rule, the letter contained the following paragraph:

> " In view of the decision cited above, no investigation has been conducted by this Service into the alleged malpractice and no opinion is expressed in the matter."

Such an attitude of unconcern is astounding and shocking, to say the least, and can only serve to perpetuate medical abominations. That the Army should be so callous and smug in its mantle of Feres immunity as to ignore an obvious instance of medical neglect suffered by the petitioner (blind, paralyzed and unable to speak) should further compel this Court to remove medical neglect cases from the strictures of Feres.

An additional derivitive benefit of such a change would be the ultimate reduction in the cost of maintaining those individuals who have suffered from medical neglect. It has cost thousands of dollars to rehabilitate Ms. Chaffee. What has it cost the government to maintain the thousands of others? It must be costing the government millions in taxpayer dollars to maintain the legion of victims of military medical neglect. Something must be done. This Court adopted this harsh exclusion to the FTCA; it should not wait any longer to act. The situation cries out for judicial action.

It has been expressed that permitting military malpractice suits might discourage doctors from enlisting in the armed forces. Such fears are unwarrented since Congress adopted a statute in 1976 (the so-called Gonzales Bill) giving immunity to all military medical staff from personal liability in such suits. 10 U.S.C. 1086(a).

Allowing suits against the government, however, would put pressure on the services to monitor the incompetents and weed them from the ranks.

V

RECENT SUPREME COURT RULING FURTHER IDENTIFIES FUNDAMENTAL DIFFERENCES BETWEEN MEDICAL MALPRACTICE ACTIONS AND OTHER FERES DOCTRINE CASES.

In the recent case of Chappel[1] v. Wallace, __U.S.__,78 L. Ed. 2d 586 (1983), this Court noted the existence of two " special factors" which dictated against permitting law suits by enlisted men against their superiors for alleged constitutional violations. Id. 593.

One factor was the need to maintain discipline and the fear that permitting law suits would undermine such efforts. The other factor was the provision within the Uniform Code of Military Justice, 10 U.S.C. Sec. 983, of a mechanism " for review and remedy of complaints and grievances". Id. 592.

From the foregoing commentary in part III, supra, it is clear that discipline would not be jeopardized if suits were permitted in medical neglect cases since a military doctor's association with a patient is strictly a doctor-patient relationship, and is unlike that of an officer issuing commands to subordinates.

The second special factor of Chappell, the so-called parallel system of military justice is simply unavailable to victims of military medical neglect. As stated previously, when petitioner's administrative

claim was denied, the Army declined to investigate the matter or even express an opinion on the matter. Such a mechanism of review, or lack of one, is indeed a far cry from the broad mechanism of review outlined in Chappell, supra at 592.

The petitioner is caught in a veritable "catch twenty-two": she cannot sue in civil courts due to the Feres disqualification; and since she can't sue no investigation or review is entertained by the Army; and, therefore, no possibility of appropriate redress.

Neither of the " two systems of justice" articulated in Chappell, are available to victims of military medical neglect- a most inequitous arrangement.

Chappell, therefore, though not involved with medical torts per se, is nonetheless most instructive and enlightening when read together with the instant case and reveals the lack of a rational basis for the continued application of Feres to instances of medical neglect.

VI

APPELLANT'S STATUS AS A RECRUIT IN BASIC TRAINING SHOULD BE VIEWED AS AN ADDITIONAL EXCEPTION TO THE FERES DOCTRINE

If, in the final analysis, this Court reaffirms Feres in medical neglect cases,

petitioner maintains that her status as a recruit at the time of her injury should be viewed as another exception to the Feres rule.

It is not merely being a member of the armed forces at the time of an alleged negligent act that brings one within the proscription of Feres, but rather the " status" of the individual at the time of the tort. Harten v. Coons, 502 F.2d 1363 (10th Cir. 1974).

This Court has carved two exceptions to the Feres preclusion based on an individual's military status at the time of the alleged negligent act. Brooks v. United States, 337 U.S. 49 (1949) (service person on leave or pass), and United States v. Brown, 348 U.S. 110 (1954). (veteran's status). Similarly, petitioner argues that her status as a recruit should also be construed as an additional exception to Feres.

A recruit in basic training is an individual in transition from a civilian status to one permanently assigned to a designated unit upon satisfactory completion of basic training. Such training represents a period of probation and evaluation. In the light of her unique and transitory status, petitioner asks this Court to find that she is not bound by the constraints of the Feres rule.

One might argue that recruits are eligible, just as other military personnel, to receive

veterans' benefits and, therefore, should continue to be Feres bound. As noted above, military personnel on leave or pass are also eligible for veterans' benefits, yet they can bring a cause of action for negligent acts committed against them while on leave or pass. Brooks v. United, supra.

Also, veterans' benefits, though substantial, seldom provide adequate compensation for injuries sustained in medical neglect cases such as those suffered by petitioner, Denise Chaffee.

VII

"INCIDENT TO SERVICE" STANDARD OF FERES IS VAGUE AND IMPOSSIBLE TO APPLY UNIFORMLY AND SHOULD BE REPLACED BY THE LINE OF DUTY CONCEPT

The phrase " incident to service" standard enunciated in Feres is vague, imprecise and has resulted in much confusion and disparity in decisions among the various circuits.

For example, the Feres and Brooks decisions emphasized active duty status, which excluded from Feres those on pass, liberty or furlough. See also Barnes v. United States, 103 F.Supp. 51 (1962); Henninger v. United States, 473 F. 2d 814 (9th Cir. 1973).

Other courts described the test as consisting of: "the varying degrees of proximity between the particular serviceman's injury and the particular geographical status and the military

function of the activity in which the serviceman was engaged while injured ". Gursley v. United States, 232 F. Supp. 614 (D.C. Cal. 1964).

Other courts have emphasized the location of the claimant when injured. For example, if plaintiff were on base at time of injury, the recovery has been denied; if off the base the claim was granted. Thus recovery is denied to a serviceman on leave even if he is injured before he leaves the base. Coffey v. United States, 324 F. Supp. 1087 (1971).

Such decisions deny recovery to servicemen who apparently could recover in other jurisdictions which interpret incident to service differently. In Downes v. United States, 249 F. Supp. 626 (D.C. N.C. 1965) and Parker v. United States, 611 F. 2d 1007 (5th Cir. 1980) recovery was allowed where servicepersons on pass or leave were injured while still on base, although attempting to leave.

Still other cases have interpreted incident to service standard as to whether or not claimant was subject to military orders at the time of the injury. Archer v. United States, 217 F.2d 548 (1954); Fass v. United States, 191 F. Supp. 367 (1961).

The broadest construction of the standard is exemplified in Shultz v. United States,

421 F.2d 170 (5th Cir. 1969), and Buer v. United States, 241 F. 2d 3 (7th Cir. 1956). Both cases involved servicemen brought to a military hospital, following an automobile accident while on leave , and who suffered additional injuries due to alleged medical neglect. Both courts rejected the Feres-Brooks on active duty-off active duty criterion in favor of military non-military status distinction and denied recovery.

Some courts have used the narrower " line of duty" concept and have based recovery under the Act on whether the injury was incurred while the serviceman was actually acting in the line of duty. Archer v. United States, 217 F.2d 548 (1954); Hale v. United States, 416 F. 2d 355 (6th Cir. 1969); 452 F.2d 608 (1971).

From the foregoing, it can be seen that the failure to precisely define " incident to service" has resulted in different courts applying varying standards. This has lead to the granting of recovery by servicemen in some jurisdictions that would have been denied in others.

This confusiom and unfairness to servicemen can only be eliminated by a reconsideration of the entire incident to service concept. The present standard is unworkable.

It is submitted that this Court adopt the rule of Hale, supra. That test no longer includes the expansive and confusing "incident to service" standard but rather whether an injury " arose out of or in the course military duty". Id. 558.

Using that test, the Feres doctrine would be limited to the scope of a serviceman's normal duty assignments. Such an approach would insure that military command and decisional functions (and the attendant maintenance of discipline) would not be hampered. On the other hand, many non-duty injuries such as those sustained in medical malpractice would, under this standard, be actionable.

VIII

INCONSISTENT RESULTS IN THE APPLICATION OF THE FERES RULE TO MEDICAL MALPRACTICE CASES

The current application of the Feres rule as it relates to instances of medical neglect is fraught with inconsistencies, often resulting in irrational outcomes.

For example, if an individual is on furlough or leave and is negligently hurt by another government employee during that period, he may have a cause of action depending on the particular circumstances of the case (Brooks, supra). However, if the person is transported to a military hospital and dies due to medical neglect, his estate has no cause of action. (Schultz v. United States, 421 F.2d 170 (5th Cir. 1969). The

The rule of Brooks does not apply to instances of medical neglect in military hospitals since military regulations view the move to the hospital as a change of status from "leave" to "sick in hospital" status; and the hospital becomes the new duty station. (Buer v. United States, 241 F. 2d 3(7th Cir. 1956) ; Schwager v. United States, 326 F. Supp. 1081 (E.D.D.C. Pa. 1971)).

Moreover, if a child is born to a woman who is in the service and the infant is born with congenital rubella syndrome as a result of negligent medical treatment she received during her basic training, neither she nor the child have a cause of action. (Scales v. United States, F.2d 970 (5th Cir. 1982). However, if the same situation occurred to the wife of an enlisted man, she would have a cause of action (Robak v. United States, 658 F. 2d 471 (7th Cir. 1981)). Similarly, an ex-Army man and his wife whose child was born with severe defects due to negligent treatment at an Army Hospital were recently awarded a damage settlement. (Shaw v. United States, cite unavailable; case reported in Army Times 28 March 1983, p.4).

On the other hand, had the wife been a serviceperson, such a settlement would have been denied. It is indeed ironic that the

person serving her country is precluded from suing on the same cause of action accorded to a dependent.

A recent case further illustrates theillogical constraints of Feres on military personnel. The Navy Court of Military Review recently left intact a conviction by a lower Navy panel for deriliction of duty by a Navy physician who was fined $2,000, had his surgical privileges suspended, and was given a stern reprimand. A District Court, nevertheless, dismissed a wrongful death suit against the government based on the Feres rule. (The official cite was unavailable; the account is given in the Navy Times, 7 March 1983,p.1).

IX

WIDESPREAD JUDICIAL CRITICISM OF THE FERES RULE, ESPECIALLY AS APPLIED TO MEDICAL NEGLECT CASES

Courts have become increasingly vocal in expressing their heightened concern and apprehension over the continued application of the Feres doctrine with its harsh results, especially in relation to the medical malpractice cases in the military. See Hunt v. United States, F. 2d 580,589 (D.C. Cir. 1980) (" The Feres doctrine clearly lives, although its theoretical bases remain subject to serious doubt"); Labash v. United States, 668 F.2d 1153,

1156 (10th Cir. 1982)(" therefore, once again we are constrained to follow the Feres doctrine, notwithstanding its harsh result"); Veillette v. United States, 615 F. 2d 505,506 (9th Cir. 1980) (" reluctantly" affirming dismissal under the Feres doctrine); Miller v. United States, 643 F. 2d 481,495 (8th Cir. 1980) (" We do not pretend that this is an easy case. There is an element of unfairness in denying ... Private Miller's survivors the rights..."); Lombard v. United States, 690 F.2d 215,225 (D.C. Cir. 1982) (" In rendering this decision, we are not without very considerable sympathy ... we must, however, adhere to Feres"); Scales v. United States, 685 F.2d 970,974 (5th Cir. 1982) (" we are compelled, however reluctantly, to reverse the judgement.."); Monaco v. United States, 661 F.2d 129.134 (9th Cir. 1981) (" The Feres doctrine today stands on shaky grounds with its precise justification somewhat confused... The result in this case disturbs us..."); Troglia v. United States, 602 F. 2d 1334,1338 (9th Cir. 1979) (" The Feres rule has attracted more than its share of confusion in subsequent judicial opinions."); James v. United States, 358 F. Supp. 1381 (D. R.I. 1973, Aff'd 530 F. 2d 962 (1st Cir. 1976) (" this holding gives me little pleasure. An injustice has been done in this case and

it ought to be remedied"); Parker v. United States, 611 F.2d 1008,1014 (5th Cir. 1980) ("whether the exception ... should be read broadly or narrowly are questions that have been answered inconsistently"); Thomason v. Sanchez, 539 F. 2d 955, 960 (3rd Cir. 1976) (" We are sympathetic with appellant's position..."); Peluso v. United States, 474 F. 2d 605,606 (3rd Cir.) (the court stated it would"welcome" the Supreme Court reversal of the Feres doctrine, stating, " the facts pleaded here, if true, cry out for a remedy"); Jaffee v. United States, 663 F.2d 1226,1239, 1247 (3rd Cir. 1981) (" this is a difficult and troubling decision");
Hall v. United States, 528 F. Supp. 963,968 (D.C. New Jersey) (" this court reiterates its reluctant conclusion..."); Meagher v. United States, 551 F.2d 313, unpublished memorandum case # 75-2458) (" The result is extremely harsh, but unless and until the Supreme Court overturns or modifies Feres, we are compelled to follow it."); In the instant case, the Court of Appeals noted that "judicial modification (of Feres) can only be accomplished by the Supreme Court itself" Memorandum Order of Appendix A, infra.

Commentators and scholars, from the outset, have been practically unanimous in their criticism of the Feres, especially as it applies to instances of military medical neglect. See Greig and Althoff, Medical Malpractice in the United States Military: the Feres Doctrine Revisited, 9 Barrister (No.3) 35,39 (1982) (" ... the assumption that harm would accrue to the military if service persons could bring causes of action for medical malpractice seem farfetched..."); Jacoby, The Feres Doctrine, 24 Hastings L.J. 1281,1301 (1973) (" Feres should find no application in suits against fellow servicemen for medical malpractice"); Note, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery? 77 Mich L. Rev. 1099,1126 (1979) (" Feres has placed an undesirable and inequitable disability upon members of the armed services.") Petitioner highly recommends to the Court the latter article for a cogent analysis of the Feres doctrine.10/

10/ For additional critical reviews of the Feres doctrine see: Hitch, The Federal tort Claims Act and Military Personnel,8 Rutgers L. Rev. 316 (1954); Krotseng, The Supreme Court and the Tort Claims Act: End of an Enlightened Era? 27 Clev. L.R. 267 (1978); Rhodes, The Feres Doctrine After Twenty-five Years, 18 A. F.L. Rev. 24 (1976); Stratton, Military Medical Malpractice: Remedies for the Overseas Dependent, 29 Hastings L.J. 589 (1978); Favish: Radiation Injury and the Atomic Veterans 32 Hastings L.J. 933 (1981).

X

CAMI: A NATIONWIDE CITIZENS GROUP FORMED IN REACTION TO THE INEQUITIES FOSTERED BY FERES

In response to a longstanding and growing citizen dissatisfaction over the many unanswered and unresolved questions that frequently accompany tragic circumstances in the military, including instances of medical neglect, a national organization, CAMI (an acronym for Citizens Against Military Injustice) has recently been formed. The National Headquarters is located in San Diego, California. CAMI is made up of parents, spouses, children, retired veterans, and friends of aggrieved servicepersons. CAMI has chapters in thirty-two states and is rapidly expanding.

The organization has been featured on national television programs (e.g. Donahue Show, September, 1982; Twenty/Twenty, June 16, 1983; C-Span, June 22, 1983 etc.). Major newspapers have also written about this energetic group, its goals, and the tragic events which focused the need for such an organization (Providence Journal, Providence Rhode Island, June 26 1983, p.1); The Tribune Review, Greenberg, Pa.13 July 1983, and others).

Recently over two hundred members traveled to Washington, D.C. on June 22-23, 1983 to

to meet with members of Congress and the Pentagon in an effort to mobilize support for long-overdue changes in respect to the Feres doctrine.

As a result of CAMI's efforts, a large segment of our citizenry has become aware of the enormous inequities fostered by the continued validity of the Feres rule , especially as it pertains to military medical neglect.

The very fact that such an organization was formred to combat the inequities of the Feres doctrine should further compel this Court, the creator of Feres, to re-evaluate the many aspects of this often criticized rule. Changes in the law, as sought through this petition, would certainly go a long way in answering the pleas and quelling the anguish and frustration of thousands of our citizens.

XI

CHILLING EFFECT OF FERES ON ENLISTMENT OF RECRUITS IN THE ALL VOLUNTEER ARMED SERVICES

Another major change that has occurred since the inception of the Feres rule has been the institution of the all volunteer armed forces. The fact that medical neglect abounds in the military, coupled with the increased knowledge that service persons are generally precluded from recourse to legal redress in civil courts, can only chill a prospective inductee's desire to pursue a

military career.

Appellant personally knows of two instances where individuals have changed their minds about joining the service as a result of her current predicament. How many other potential candidates are being turned off due to continued application of Feres in medical neglect cases.

XII

SUMMARY

A review of the aforementioned commentary reveals that (1) many of the initial considerations that initially supported Feres have either been eliminated, eroded or applied inconsistently; (2) that concern over maintenance of military discipline ia a prime factor keeping Feres alive; (3) that the two "special factors" found in the Chappell case are totally lacking in Feres disqualified medical neglect cases; (4)that medical standards are not related to military command or decisional functions; therefore, permitting law suits in cases of military medical malpractice would not hinder or interfere with discipline or morale; (5) that there is an apparent epidemic of medical negligence in our military hospitals as evidenced by the large number of cases reported and claims filed wih Department of Defense; (6) that the

cost of maintaining those service persons medically neglected is very expensive (7)that maintenance of law suits in instances of military medical neglect would derivitively result in an improved health-care system along with concomitant reduction in costs cited in number six (6) above; (8) that there is a new and rapidly growing national citizens group (CAMI) formed in response to general citizen dissatisfaction over existing inequities in the military such as the current status in the law in regards to victims of military medical neglect;(9) that the incident to service standard of Feres is vague, cumbersome and impossible to apply uniformly; (10) that, as a consequence, there are enormous inequities and inconsistencies in the application of the Feres rule, especially in medical neglect cases; (11) that there are strong and long-standing sentiments among the judiciary and legal scholars that fundamental changes are needed in regards to the current application of the Feres rule to military medical torts; and (12) that the continued application of the Feres could have a chilling effect upon recruitment efforts in the all-volunteer armed services.

The collective import of the abovementioned factors is to send an unmistakable and pressing message to this Court: that the time is ripe to chart responsible, reasonable and innovative approaches to solve the problems and diminish the anguish engendered by the Feres disqualification of medically neglected military personnel.

This Court created, Congress has ignored, and the lower courts have, under constraint, perpetuated thirty-three years of inequitable treatment of victims of military medical neglect. It is time for this court to right the wrong, to listen to the pleas and ongoing criticisms, and to redefine the scope of Feres in the light of the aforementioned discrepancies.

To that end, it is submitted that this Court adopt the rule of Hale, supra, using the narrow standard of"whether an injury arose out of military duty". Using this test, many non-duty injuries such as those resulting from medical neglect would, under this standard, be actionable.

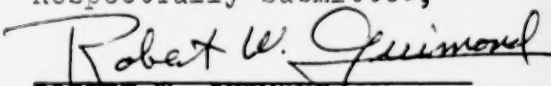
In permitting claims against the United States by active duty servicepersons who suffer from medical neglect this Court would correct a long-standing and major flaw in the law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should issue to review the judgement and opinion of the First Circuit.

Dated: 15 August 1983

Respectfully submitted,



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CERTIFICATE OF SERVICE

Fall River, Massachusetts
17 August 1983

I, Robert W. Guimond, hereby certify that I have this day served three copies of the PETITION FOR A WRIT OF CERTIORARI by mailing same, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, and mailing three copies to Assistant United States Attorney Charles K. Mone, Esq., Office of the United States Attorney, Post Office and Courthouse Building, Boston, Massachusetts 02109.

Robert W. Guimond
ROBERT W. GUIMOND

APPENDIX A

OPINION OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1877

DENISE A. CHAFFEE,
Plaintiff, Appellant.

v.

UNITED STATES OF AMERICA,
Defendant, Appellee.

Before Campbell, Chief Judge,
Breyer, Circuit Judge,
and Re,* Judge

MEMORANDUM AND ORDER
Entered May 19, 1983

We have reviewed the record after briefing and argument and believe that the district court correctly dismissed under principles announced in Feres v. United States, 340 U.S. 135 (1950). No reason has been pointed

* Chief Judge, U.S. Court of International Trade, Sitting by Designation.

out sufficient for us to distiguish this case on a principled basis from the many cases which courts have held were barred under Feres. Congress as well as the Supreme Court had had over thirty years since the decision in Feres to take corrective action should either body have believed that Feres cut too wide a swathe. For one of the circuits to purport on its own to reconsider Feres would, in our view, be inappropriate. Judicial modification can only be accomplished by the Supreme Court itself.

Affirmed.

By the Court,

Francis P. Scigliano
ClerK.

Office-Supreme Court, U.S.
FILED
SEP 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-265

In the Supreme Court of the United States

OCTOBER TERM, 1983

DENISE A. CHAFFEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-265

DENISE A. CHAFFEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that this Court should modify the rule of *Feres* v. *United States*, 340 U.S. 135 (1950), so as to permit her to maintain an action under the Federal Tort Claims Act to recover damages for injuries she suffered while an Army recruit allegedly due to malpractice by military physicians.

1. Petitioner was completing basic training in the United States Army when, on July 25, 1979, she was admitted to the Noble Military Hospital at Fort McClellan, Alabama, complaining of abdominal pains and amenorrhea. Two weeks later, during a surgical procedure, she suffered serious permanent injuries allegedly due to the negligence of military medical personnel. Petitioner has subsequently received prolonged rehabilitative treatment in various veterans' hospitals and is eligible for the full range of veterans' benefits (Pet. 2-3, 25).

As required by the Federal Tort Claims Act, 28 U.S.C. 2675(a), an administrative claim for damages was filed with the United States Army on July 24, 1981. The Army rejected the claim on August 13, 1981, citing the rule of *Feres* v. *United States, supra* (see Pet. 4, 20). Petitioner then filed this action under the FTCA in the United States District Court for the District of Massachusetts. The district court dismissed the complaint for failure to state a claim upon which relief could be granted. The court of appeals affirmed, stating (Pet. App. 1a-2a):

> No reason has been pointed out sufficient for us to distinguish this case on a principled basis from the many cases which courts have held were barred under *Feres*. Congress as well as the Supreme Court has had over thirty years since the decision in *Feres* to take corrective action should either body have believed that *Feres* cut too wide a swathe.

2. As the court of appeals recognized (Pet. App. 1a), the decision in this case is controlled by *Feres* v. *United States, supra*. In *Feres* the Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. There can be no doubt that petitioner's injuries are "incident to service" within the meaning of *Feres*, for two of the cases decided together with *Feres* presented claims for damages for alleged malpractice by Army surgeons. See 340 U.S. at 135 n*, 136-137. The *Feres* doctrine itself was reaffirmed in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977). And the vitality of the considerations that underlie *Feres* was most recently reaffirmed in

Chappell v. *Wallace*, No. 82-167 (June 13, 1983). Accordingly, petitioner's complaint was properly dismissed on the basis of *Feres*.[1]

3. Petitioner presents a catalogue of reasons why the application of *Feres* to malpractice by military physicians should now be reconsidered. See, *e.g.*, Pet. 36-38. But it is not seriously suggested that the decision below conflicts with any decision of this Court or any other court of appeals. The arguments raised rest on policy considerations, and they accordingly should be addressed to the legislative branch rather than to the courts. Cf. *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), slip op. 21-23. In *Feres* itself the Court took care to note (340 U.S. at 138): "if we misinterpret the Act, * * * Congress possesses a ready remedy." And it is proper to look to Congress for any modification of the prevailing interpretation of the FTCA, not only because the pertinent considerations are policy matters best evaluated by a legislature, but because the Federal Tort Claims Act is a waiver of the sovereign immunity of the United States, which is to be strictly construed, *United States* v. *Sherwood*, 312 U.S. 584, 590-591 (1941), and which can be enlarged only by Congress. *United States* v. *Shaw*, 309 U.S. 495, 500-502 (1940); *Munro* v. *United States*, 303 U.S. 36, 40-41 (1938).

Although the policy arguments advanced by petitioner have been placed before Congress, Congress has not to date taken the action that petitioner seeks. See H.R. Rep. No. 97-384 (Pt. I), 97th Cong., 1st Sess. 5 (1981) (indicating

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[1]Petitioner suggests (Pet. 23-25) that her status as a recruit at the time of her injury warrants creation of an exception to the *Feres* doctrine. But she provides no rational justification for the proposed distinction between soldiers in basic training and other soldiers.

approval of *Feres*).[2] The matter remains before Congress.[3] In the circumstances, the proposed overruling of *Feres* would be especially inappropriate. See generally *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977); *Hodel* v. *Indiana*, 452 U.S. 314, 333 (1981).

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[2]See also *The Feres Doctrine As It Relates to Private Claims: Hearing Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982). During this hearing, government witnesses emphasized the existing array of disability compensation, dependents' benefits, rehabilitation services and medical care afforded to persons disabled while in service in the armed forces. See *id.* at 50 (testimony of Deputy Assistant Attorney General Bonds); *id.* at 61-67 (statement of John H. Thompson, Deputy Assistant General Counsel, Veterans' Administration). The availability of this alternative compensatory scheme was, of course, one of the considerations underlying the decision in *Feres* itself. See 340 U.S. at 140, 144-145 & n.12. The difficulty of integrating a FTCA remedy with the statutory veterans' disability compensation scheme, in the absence of guidance on this subject from Congress, which counseled against judicial recognition of a remedy under the FTCA in *Feres* (see 340 U.S. at 144), remains a compelling consideration against adopting that course today.

[3]See H.R. 1942, 98th Cong., 1st Sess., introduced on March 7, 1983. The bill would add a new Section 2681 to Title 28 of the United States Code providing that, "with respect to claims arising on or after the date of the enactment of this Act,"

> Claims may be brought under [the FTCA] for damages against the United States for the personal injury or death of a member of the Armed Forces serving on active duty if the claim arises out of medical or dental care furnished the member in a Department of Defense hospital.

This bill was the subject of a hearing before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee on April 13, 1983. The bill has not, as yet, been acted upon by the Committee.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1983

DOJ-1983-09

Office-Supreme Court, U.S.
FILED
OCT 11 1983
ALEXANDER L. STEVAS,
CLERK

No.: 83-265

IN THE

Supreme Court of the United States

October Term, 1983

DENISE A. CHAFFEE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY IN SUPPORT OF HER PETITION

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Dated: 5 October 1983

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Petitioner files this Reply to respond to some statements of the respondent which would otherwise give a misleading impression of the case.

First, respondent argues that since two of the cases decided together with Feres v.

United States, 430 U.S. 135 were military medical neglect claims (Resp.2), all alleged cases of military medical malpractice were intended to be included within the preclusive strictures of Feres, supra.

That may have been the initial thrust of the decision. Petitioner, however, has shown that, due to the judicial erosion of some of the bases that initially supported Feres (Pet. 8-12) along with other changes and inconsistencies in the application of the law (Pet. 17-22; 28-30), some of which were perhaps not forseen or contemplated by this Court, there has evolved an overwhelming national sentiment, both within and without the judiciary, pressing for changes in that aspect of the Feres rule (Pet. 30-35).

Accordingly, this Court should review whether there is still a rational justification for the continued application of the Feres preclusion in instances of alleged military medical neglect.

Second, respondent cites the recent cases of Stencel Aero Engineering Corp. v. United

States, 431 U.S. 666 (1977) and Chappell v. Wallace, No. 82-167 (June 13, 1983) as reaffirming the considerations underlying Feres and giving further support to the lower court's dismissal of petitioner's complaint.

Such a broad characterization, however, is misleading. For example, one of the initial considerations of Feres was the so-called lack of " parallel private liability" Id. at 142. That consideration, however, was rejected in United States v. Muniz, 374 U.S. 150; consequently, that factor was not reaffirmed by the abovementioned cases.

The essence of the case at bar, however, is not so much whether Stencel and Chappell, supra reaffirm Feres but rather whether the remaining principles should continue to apply to military medical neglect cases.

In fact, petitioner specifically refers to Chappell, supra and distinguishes it from the instant cases by showing that the two " special factors" which barred suits by servicepersons against superior officers were not applicable or available to petitioner

in the instant case (Pet. 22-23).

Third, respondent suggests that since a number of petitioner's arguments rest on policy considerations, they should be addressed to the legislative branch rather than to the courts (Resp.3). Since when are policy considerations exclusively within the purview of legislative consideration? Surely, the decision in Feres was based on several policy considerations, Id, at 142-145. The rationale underlying many other decisions of this Court are based on particular policy considerations.

In the instant case, petitioner is asking the Court to examine the continued applicability of the policy considerations in Feres to military medical malpractice cases. It is only reasonable and obvious that this Court should be able to review its own policy considerations and, thus, respondent's contention to the contrary is unwarranted.

Furthermore, the respondent has incorrectly characterized the nature of the Petition as enlargement of the waiver of

sovereign immunity of the United States accorded by the Federal Torts Claims Act, hereinafter referred to as the FTCA. Respondent, therefore, asserts that only Congress has the power to enlarge upon its own statutes (Resp. 3).

The fact remains, however, that in Feres this Court narrowed the scope of the FTCA by creating its own exception to the FTCA. Has the government ever contended that only Congress should have narrowed the scope of its own statute? Certainly not.

Petitioner is seeking to remove alleged cases of military medical neglect from the Feres proscription. Petitioner, therefore, does not wish to enlarge upon the original provisions of the FTCA but rather to restore to a class of military citizens a right that was incorrectly denied them by this Court thirty-three years ago.

Fourth, respondent generally cites Illinois Brick Co. v. Illinois, 431 U.S. 720 736 (1977) and Hodel v. Indiana, 452 U.S. 314, 333 (1981) in furrher supporting its

contention that Congress, rather than this Court, is the appropriate forum for review of the matter before the bar (Resp. 4).

The instant case, however, is distinguishable from the above cited cases in that petitioner here is not seeking to have the Court overrule or interpret a particular provision of a statute. Rather, petitioner is asking this Court to review the viability of certain applications of its own court made exception to the FTCA.

Under those circumstances, the review sought by petitioner in this Court is indeed most appropriate.

Perhaps the most significant aspect of respondent's answer to petitioner's brief is the silence on the many issues and policy matters discussed in her brief. The numerous and varied arguments put forth by petitioner are succinctly dismissed as a "catalogue of reasons" which should be reviewed by Congress and not by this Court (Resp. 3).

It would appear, therefore, that the

substance of petitioner's arguments have generally gone unchallanged. Rather, there is an effort to divert one from the substance of the brief by placing an inordinate stress that Congress should be the arbiter in this matter.

Conclusion:

If, in the light of a reasoned evaluation, this Court concludes that petitioner's arguments in support of the changes sought are lacking in merit, then denial of her Petition is in order. However, to ignore the many factors articulated in petitioner's brief because respondent contends that such arguments should be addressed to the legislative branch would, unfortunately, reflect an abdication of this Court's rightful function to review those aspects of the law which clearly need to be reexamined.

The legislature certainly has not corned the market in this area. The fact remains, that this Court, and not Congress, created the Feres exception to the FTCA; and

therefore, it is most appropriate that this Court be the forum for the reconsideration of Feres as it applies to alleged instances of military medical neglect.

It may be that, under particular circumstances or when certain legal theories prevail, some laws, though appearing harsh on the surface, seem justified for the greater good of society.

However, in the course of time's passage, changes in policy or legal theories may no longer support or warrant the continued application of such laws or portions thereof. Unfortunately, the wheels of judicial and legislative change turn slowly due to the intrinsic inertia of the systems.

In the interim between the identification and solution of a given problem in the law, many individuals find themselves hapless victims of the aforementioned inertia and are denied appropriate legal recourse.

Petitioner is such a victim. The problem has long been identified, criticized, and the

momentum is definitely in the direction of change. It is hoped, therefore, that this petition will provide the needed impetus to prompt this Court to undertake the long overdue reexamination of the legal rights of the medically neglected in the military.

Petitioner prays that her Petitiin be granted.

Dated 5 October 1983

Respectfully submitted,

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CERTIFICATE OF SERVICE

Fall River, Massachusetts
7 October 1983

I, Robert W. Guimond, hereby certify that I have this day served three copies of PETITIONER'S REPLY IN SUPPORT OF HER PETITION by mailing same, postage paid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, and mailing three copies to Assistant United States Attorney Charles K. Mone, Esq., Office of the United States Attorney, Post Office and Courthouse Building, Boston, Massachusetts 02109.

Robert W. Guimond

ROBERT W. GUIMOND